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Twin Faber Sdn Bhd v Ng Cheng Keng

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(A)-1346–07 OF 2021
YAACOB MD SAM, HADHARIAH SYED ISMAIL JJCA AND AZMAN ABDULLAH J
30 JUNE 2022

C

Companies and Corporations — Winding up — Costs — Whether court could order costs of winding up proceedings to be borne personally by non-party — Whether facts showed person who affirmed affidavits to oppose winding up petition and applied to strike out the petition was in fact the directing mind of the D *company — Whether persons named in Companies Commission of Malaysia records as being the company's directors had lodged police reports stating they were not its directors — Whether costs could be ordered against non-party to the proceedings provided the party was warned in advance that costs would be applied for against him — Takako Sakao v Ng Pek Yuen & Anor (No 3) [2010] 2 MLJ* E *141 (Federal Court)*

The appellant's winding up proceedings against a company ('LKD') was resisted by the respondent ('NCK') who used to be employed as a manager in LKD. NCK had affirmed four affidavits to oppose the winding up petition and F had also applied to strike out the petition. On the day the petition was heard, NCK did not attend court and neither did any lawyer appear on LKD's behalf. In ordering LKD's winding up, the court, inter alia, ordered costs on an indemnity basis to be paid to the appellant's solicitors (in the sum of RM75,000) and to the solicitors for the six supporting creditors (in the sum of G RM12,000) by the liquidators out of the assets of LKD within 14 days failing which those costs were to be paid by NCK personally. The winding up order that was served on NCK bore an endorsement stating that if he failed to obey the terms of the order, execution proceedings would be taken against him. NCK took out an originating summons ('OS') to stay/set aside that part of the H winding up order directing him to pay the costs personally. He also sought to set aside/strike out the penal endorsement addressed to him in the winding up order. NCK contended that the order requiring him to pay the costs personally was void and illegal for contravening s 462 of the Companies Act 2016 ('the CA') which provided that all costs and expenses properly incurred in winding I up proceedings should be paid out of the assets of the company. NCK argued that costs should not have been ordered against him personally because: (a) he was not a party to the winding up proceedings; (b) he was not a director or shareholder of LKD but was merely its salaried manager and had affirmed the affidavits opposing the petition on the instructions of LKD's directors; (c) on

the hearing date of the petition, LKD was not legally represented in court and the order directing him to bear the costs personally was made without giving him an opportunity to be heard. The High Court agreed with NCK's contentions and allowed his OS. The judge held, inter alia, that since that part of the winding up order directing NCK to bear the costs contravened s 462 of the CA and was therefore null and void, the court had the jurisdiction to set aside the impugned part based on the Federal Court's decision in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad* [1998]1 MLJ 393 ('Badiaddin'). In the instant appeal against the decision, the appellant submitted that s 462 of the CA only applied to voluntary winding up whereas in the case of winding up by the court, the applicable provision was s 468(2) of the CA where the phrase 'unless the court orders otherwise' would allow the court to order costs against a non-party in an appropriate case.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

(1) After carefully considering the facts and the law, this court agreed with the appellant that NCK was the directing mind of LKD in view of the fact that he had affirmed affidavits to oppose the winding up petition and had also applied to strike out the petition whereas the two persons named as directors of LKD in the records of the Companies Commission of Malaysia, namely, Abdul Jalal bin Kasnan and Muhamad Nasron bin Kasnan, had lodged police reports to state that they were not its directors (see para 30).

(2) Although the appellant's solicitors had, by letters, notified NCK of the hearing date of the winding up petition and warned him that they would apply for costs against him personally, NCK chose not to attend court on the hearing date. NCK could not now complain that the order of costs against him was made by the court upon hearing the appellant only (see para 31).

(3) The High Court was bound, by stare decisis, to follow the Federal Court's decision in *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141 which established that costs could be ordered against a non-party provided that party was warned in advance that costs would applied against him personally, as was the case here (see para 32).

(4) There was no need for the High Court judge to have given a narrow interpretation to s 468(2) of the CA when the law was settled. Since the court had power to order costs against a non-party, the order directing NCK to personally pay the costs was not void or illegal. It followed that the principle in *Badiaddin* was not applicable in the present case (see para 32).

[Bahasa Malaysia summary

Prosiding penggulungan perayu terhadap sebuah syarikat ('LKD') dibantah oleh responden ('NCK') yang sebelum ini bekerja sebagai pengarah di LKD. NCK telah mengesahkan empat afidavit untuk menentang petisyen penggulungan dan juga telah memohon untuk membatalkan petisyen tersebut. Pada hari petisyen itu didengar, NCK tidak hadir ke mahkamah dan mana-mana peguam tidak hadir bagi pihak LKD. Dalam perintah penggulungan LKD, mahkamah antara lain memerintahkan kos ganti rugi dibayar kepada peguam cara perayu (dalam jumlah RM75,000) dan kepada peguamcara bagi enam pemiutang sokongan (dalam jumlah RM12,000) oleh pelikuidasi daripada aset LKD dalam tempoh 14 hari sekiranya gagal kos tersebut perlu dibayar oleh NCK secara peribadi. Perintah penggulungan yang disampaikan kepada NCK menyatakan bahawa sekiranya dia gagal mematuhi syarat-syarat Perintah tersebut, prosiding pelaksanaan akan diambil terhadapnya. NCK memfailkan saman pemula ('SP') untuk mengenepikan sebahagian daripada perintah penggulungan yang mengarahkannya membayar kos secara peribadi. Dia juga memohon untuk mengenepikan/membatalkan endorsmen penal yang dimasukkan dalam perintah penggulungan. NCK menghujahkan bahawa perintah yang menghendaki beliau membayar kos secara peribadi adalah tidak sah dan menyalahi undang-undang kerana bercanggah dengan s 462 Akta Syarikat 2016 ('AS') yang memperuntukkan bahawa semua kos dan perbelanjaan yang ditanggung di dalam prosiding penggulungan hendaklah dibayar daripada aset syarikat. NCK berhujah bahawa kos tersebut tidak sepatutnya diperintahkan terhadapnya secara peribadi kerana: (a) beliau bukan pihak dalam prosiding penggulungan; (b) beliau bukan pengarah atau pemegang saham LKD tetapi hanya pengarah bergaji dan telah mengesahkan afidavit yang menentang petisyen tersebut atas arahan pengarah LKD; dan (c) pada tarikh pendengaran petisyen itu, LKD tidak diwakili secara sah di mahkamah dan perintah mengarahkan beliau menanggung kos secara peribadi dibuat tanpa memberikan peluang kepadanya untuk didengar. Mahkamah Tinggi bersetuju dengan hujahan NCK dan membenarkan SP tersebut. Hakim berpendapat, antara lain, bahawa oleh kerana bahagian perintah penggulungan yang mengarahkan NCK untuk menanggung kos melanggar s 462 SP dan maka ianya terbatal dan tidak sah, Mahkamah mempunyai bidang kuasa untuk mengenepikan bahagian yang dipohon berdasarkan keputusan Mahkamah Persekutuan dalam *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad* [1998]1 MLJ 393 ('Badiaddin'). Dalam rayuan ini terhadap keputusan tersebut, perayu menghujahkan bahawa s 462 AS hanya memohon penggulungan secara sukarela sedangkan dalam kes penggulungan oleh mahkamah, peruntukan yang terpakai ialah s 468(2) AS di mana frasa 'melainkan jika mahkamah mengarahkan selainnya' membolehkan mahkamah memerintahkan kos terhadap bukan pihak dalam kes tertentu.

Diputuskan, sebulat suara membenarkan rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Setelah mempertimbangkan fakta dan undang-undang dengan teliti, mahkamah ini bersetuju dengan perayu bahawa NCK mengarahkan minda LKD memandangkan dia telah mengesahkan afidavit-afidavit untuk menentang petisyen penggulungan tersebut dan juga telah memohon untuk membatalkan petisyen tersebut manakala kedua-dua orang yang dinamakan sebagai pengarah LKD dalam rekod Suruhanjaya Syarikat Malaysia, iaitu Abdul Jalal bin Kasnan dan Muhamad Nasron bin Kasnan, telah membuat laporan polis untuk menyatakan bahawa mereka bukan pengarahnya (lihat perenggan 30).

(2) Walaupun peguam perayu, melalui surat, memberitahu NCK mengenai tarikh pendengaran petisyen penggulungan dan memberi amaran kepadanya bahawa mereka akan memohon kos terhadapnya secara peribadi, NCK memilih untuk tidak hadir ke mahkamah pada tarikh pendengaran. NCK kini tidak boleh menyatakan bahawa perintah kos terhadapnya dibuat oleh mahkamah setelah mendengar kes perayu sahaja (lihat perenggan 31).

(3) Mahkamah Tinggi terikat, melalui prinsip *stare decisis*, untuk mengikuti keputusan Mahkamah Persekutuan dalam *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141 yang memutuskan bahawa kos boleh diperintahkan terhadap bukan pihak dengan syarat pihak tersebut diberi amaran terlebih dahulu bahawa kos akan dikenakan terhadapnya secara peribadi, seperti yang berlaku di dalam kes ini (lihat perenggan 32).

(4) Tiada keperluan untuk hakim Mahkamah Tinggi memberikan tafsiran yang sempit kepada s 468(2) AS apabila undang-undang tersebut sudah mantap. Oleh kerana mahkamah mempunyai kuasa untuk memerintahkan kos terhadap bukan pihak, perintah yang mengarahkan NCK membayar sendiri kos tersebut adalah sah atau tidak menyalahi undang-undang. Prinsip di dalam kes *Badiaddin* tidak terpakai di dalam kes ini (lihat perenggan 32).]

Cases referred to

Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad [1998]1 MLJ 393, FC (distd)

Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd [2013] 1 LNS 462, HC (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3) [2010] 2 MLJ 141; [2010] 1 CLJ 429, FC (folld)

Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Holdings Sdn Bhd & Others [2015] 1 LNS 1385, HC (refd)

Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd

& Ors and other appeals [2021] 3 MLJ 914; [2021] 2 CLJ 331, FC (refd)
Wong See Nyam v Lemo Sdn Bhd [1995] MLJU 484; [1996] 1 CLJ 120, HC (refd)

Legislation referred to

Companies Act 2016 ss 462, 465(1)(e), 466(1)(a), 468(2)
Rules of Court 2012

Appeal from: Originating Summons No WA-28PW-84–03 of 2021 (High Court, Kuala Lumpur)

Alex Chang Huey Wah (with Lim Wen Mi) (Alex Chang & Co) for the appellant.
Kalearasu a/l K Veloo (with Shoba a/p Murugiah) (Deidra Sharina & Co) for the respondent.

Hadhariah Syed Ismail JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge given on 16 June 2021, setting aside the previous company winding up court order dated 8 September 2020 with respect to costs granted against the respondent, Ng Cheng Keng ('NCK'), a non-party in the winding up petition.

[2] On 21 March 2022, we heard the submissons of both learned counsel for the appellant and the respondent and allowed the appeal unanimously.

WINDING UP PROCEEDINGS

[3] At the High Court of Kuala Lumpur, the appellant ('Twin Faber') commenced a winding up proceedings against LKD Trading Sdn Bhd ('LKD)' via Winding Up Petition No WA-28 NCC-1257–11 of 2019 under s 465(1)(e) and 466(1)(a) of the Companies Act 2016.

[4] The respondent, Ng Cheng Keng ('NCK') was a manager in LKD. He resigned from the company on 7 August 2020.

[5] In the winding up proceedings, NCK had affirmed four affidavits in opposition of the winding up petition on behalf of LKD. He also filed a notice of motion ('encl 7') to strike out the companies winding up petition.

[6] It is not disputed that NCK did not attend court on the day the companies winding up petition was heard on 8 September 2020.

[7] On 5 August 2020, Messrs Davis & Co discharged themselves from acting for LKD in the winding up petition. Thus, LKD had no legal representation at the hearing of the winding up petition on 8 September 2020.

[8] On 8 September 2020, the High Court wound up LKD with, inter alia, the following orders:

(a) that the said LKD Trading Sdn Bhd (Registration No 199101007023 (217333-V)) to be wound up by the court order under the provisions of the Companies Act 2016;

(b) that Dato' Lee Cher Chye (No KP: 531103–10–5757) and Lim Tuck Cheong (No KP: 581012–10–6389) be appointed as the joint liquidators for the purpose of the said winding up.

(c) that the petitioner be allowed the cost on an indemnity basis of RM75,000 to be paid by the liquidators out of the assets of the respondent to the solicitors of the petitioner within 14 days from the service of this order, failing which the said costs of RM75,000 to be paid by Ng Cheng Keng (NRIC No: 540226–10–5575) personally to the solicitors of the petitioner within 30 days from the service of this order; and

(d) that the supporting creditors Cosode Resources, LNM Hardware Sdn Bhd, Sunwin Hardware Trading, M & J Iron Works Sdn Bhd, Odyssey O&G Sdn Bhd, LIWA Construction Sdn Bhd be allowed cost on an indemnity basis of RM12,000 to be paid by the liquidators out of the assets of the respondent to the solicitors of the said supporting creditors within 14 days from the service of this order, failing which the said costs of RM12,000 to be paid by Ng Cheng Keng (NRIC No: 540226–10–5575) personally to the solicitors of the petitioner within 30 days from the service of this order; and ...

[9] There was a penal notice endorsed in the said order which reads as follows:

ENDORSEMENT

If you, the within-named Ng Cheng Keng (NRIC No. 540226-10-5575) neglects to obey this order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

ORIGINATING SUMMONS

[10] On 22 March 2021, the respondent/NCK took out an Originating Summons No WA-24NCC-136–03 of 2021 against the appellant at Kuala Lumpur High Court, seeking for the following orders:

(a) Bahawa kebenaran diberikan kepada pemohon, Ng Cheng Keng (No KP: 540226–10–5575) untuk memfailkan prosiding ini terhadap LKD

Trading Sdn Bhd, responden kedua yang telah digulungkan menurut Perintah Penggulungan bertarikh 8 September 2020;

(b) Bahawa satu perintah Penggantungan Ex-Parte dibenarkan terhadap perintah No. 3 dan 4 dalam Perintah Penggulungan bertarikh 8 September 2020 mengenai kos yang diperolehi oleh Responden Pertama, Twin Faber Sdn Bhd hanya terhadap pemohon, *Ng Cheng Keng di Mahkamah Tinggi Kuala Lumpur menerusi tindakan Penggulungan Syarikat No: WA-28NCC-1257-11/2019 sehingga pelupusan Saman Pemula ini*;

(c) *Bahawa satu perintah untuk mengenepikan dan membatalkan Perintah No. 3 dan 4 dalam Perintah Penggulungan bertarikh 8 September 2020 yang diperolehi oleh responden pertama, Twin Faber Sdn Bhd terhadap pemohon, Ng Cheng Keng menerusi tindakan Penggulungan Syarikat No: WA-28 NCC-1257-11/2019 untuk sejumlah RM87,000.00 bersama dengan fee allocator berjumlah RM3,480.00 disebabkan bertentangan dengan* seksyen 462 Akta Syarikat 2016;

(d) *Bahawa satu perintah diberikan untuk mengenepikan dan membatalkan Notis Penal yang dimasukkan dalam Perintah Penggulungan bertarikh 8 September 2020 hanya terhadap Pemohon, Ng Cheng Keng;*

(e) *Kos tindakan ini ditanggung oleh responden pertama; dan*

(f) *Perintah lanjutan yang difikirkan wajar oleh mahkamah.*

[11] The respondent/NCK contended that the order of costs on an indemnity basis made against him just because he had affirmed the affidavits on behalf of LKD is void and illegal as it contravenes s 462 of the Companies Act 2016.

[12] The respondent also contended that the said order of costs is against the principle of natural justice on the following grounds:

(a) he is not a party in the winding up proceedings;

(b) he is not a director or shareholder or person having interest in LKD;

(c) he affirmed the affidavits on the instruction of his superior officer without naming the officer;

(d) he signed the affidavits on the instruction of LKD's directors;

(e) on the date of hearing of the winding up petition on 8 September 2020, LKD had no legal representation. The court had wrongly make the order of costs against the respondent based on the submission of one party namely the solicitor for the appellant only;

(f) he was only an employee who received salary and had no interest in LKD;

(g) he has resigned from LKD on 7 August 2020. On the hearing date of the winding up petition, he was no longer an employee of LKD; and

(h) pursuant to s 462 of the Companies Act 2016, costs of the winding up proceedings has to be paid from the asset of the company.

[13] The respondent further contended that the penal notice is not part of the order granted by the High Court and it was inserted unilaterally by the appellant. The respondent was not given a right to be heard and raised objection on the same.

HIGH COURT'S DECISION

[14] Having heard the submissios by the respective parties, the learned judicial commissioner ('JC') held as follows :

(a) there is a contravention of s 462 of the Companies Act 2016 which only permits the court to make orders as to costs to be payable out of the assets of the company;

(b) the fact that this court had given an opportunity for the applicant to be heard in the winding up proceedings is irrelevant and cannot be relied upon to justify the impugned orders when the same is in conflict with a written law;

(c) the applicant has proven to the satisfaction of the court that the impugned orders are null and void and this court therefore does not have the jurisdiction to grant the impugned orders;

(d) the applicant is entitled to collaterally attack the impugned orders;

(e) the impugned orders are thus a defect of a serious nature which needs to be set aside;

(f) there was a breach of natural justice in granting the impugned orders;

(g) the procedural errors alleged by the 1st respondent's counsel are mere procedural defects which are not fatal and have caused no injustice to the 1st respondent more so when the facts of this matter before concerns a contravention of a written law and thus made without jurisdiction; and

(h) it matters not whether the applicant had not named who had instructed him to affirm the affidavits in the winding up proceedings as the issue herein in the OS is whether the impugned orders are in breach of a written law.

[15] Based on the above findings and pursuant to the principle laid down by the Federal Court in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad* [1998]1 MLJ 393, the learned JC allowed prayer 1, 3, 4 and 5 of the

originating summons and set aside the order of costs against the respondent in the companies winding up order dated 8 September 2020.

THE ISSUES

[16] The two core issues raised in this appeal are as follows:

(a) whether the companies winding up court had the power to order costs against a non-party; and

(b) whether the companies winding up order dated 8 September 2020 was lawful.

As both issues are inter-related, they will be taken together.

THE APPELLANT'S SUBMISSION

[17] Learned counsel for the appellant submitted that the learned JC had erred in law when His Lordship held:

(a) that the court had no powers to order costs against a non-party;

(b) that s 462 of the Companies Act 2016 only permits the court to make orders as to costs to be payable out of the assets of the company; and

(c) that the principle in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad* [1998]1 MLJ 393 is applicable.

[18] Before us, learned counsel for the appellant submitted that costs is always at the discretion of the court and it has been the practice that the companies winding up court has been ordering costs against a non-party. In support of that proposition, the learned counsel cited the following cases: *Wong See Nyam v Lemo Sdn Bhd* [1995] MLJU 484; [1996] 1 CLJ 120; *Takako Sakao (f) v Ng Pek Yuen (f) & Anor (No 3)* [2010] 2 MLJ 141; [2010] 1 CLJ 429; *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Holdings Sdn Bhd & Others* [2015] 1 LNS 1385; *Loke Kooi Chuan Properties Sdn Bhd v Lee Kwee Foh Sdn Bhd* [2013] 1 LNS 462.

[19] In *Wong See Nyam v Lemo Sdn Bhd*, the receiver (Wong See Nyam) oppose the petition to wind up Lemo Sdn Bhd (Lemo). The receiver is not a party to the winding up petition. The High Court ordered Lemo to be wound up. With regard to costs, Richard Talalla J held:

> As to costs which are always discretionary, I made an order for costs as prayed in the petition, such costs be limited to the costs of the proceedings in the winding up as if unopposed and by reference to s 220(1) of the Act. As to costs of the petitioning creditor relative to that part and extent of the proceedings opposed by the receiver, those costs were ordered to be taxed and paid by the receiver personally, and in this

regard I had in mind that counsel for the respondent had informed me that the directors of the respondent Lemo could not be found and that at all times instructions relating to these proceedings had been taken from the receiver and not the directors.

[20] In *Takako Sakao*'s case, the Federal Court held that the appellant was a beneficiary under a constructive trust with the second respondent as trustee (the first judgment). When the trust property was sold off unilaterally by the second respondent, the Federal Court made an order in the form of specific relief (a mandatory injunction) to give effect to the first judgment. The second respondent applied to stay execution of the order made in both judgments. The Federal Court dismissed the stay application with costs of RM25,000. Learned counsel for the appellant moved the court to order that Dato' Chong Yuet Hwa, the deponent of the affidavit in support of the application for a stay be directed to pay the costs out of his own pocket.

[21] On the question whether it is permissible to order that costs be paid by Dato Chong Yuet Hwa, the Federal Court held '… it is now settled that a court has power to direct a non-party and for the present purposes Dato Chong is a non-party to pay the costs of any suit, appeal or other proceeding'. However, in that case, the Federal Court did not order costs personally against Dato Chong because the appellant did not warn Dato Chong at the earliest opportunity that he may seek to apply for costs against him.

[22] In *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914; [2021] 2 CLJ 331, the Federal Court affirmed the decision of the High Court in ordering cost personally against a non-party namely TCL together with the petitioner when the petition for companies winding up was dismissed as TCL was the directing minds behind the petition.

[23] In *Loke Kooi Chuan*'s case, the defendant's company had applied to set aside an ex parte order extending the validity of a private caveat lodged by the plaintiff over the latter's property. It was discovered that the defendant's company had been dissolved in 1978 and no longer exist. The High Court dismissed the defendant's application and ordered the deponent of the affidavits on behalf the defendant (one Khoo Kian Wui) to personally pay costs of RM5,000 to the plaintiffs.

[24] Based on the above cited cases, the appellant submitted that the companies winding up court had the necessary powers to order costs against a non-party. Therefore, it is submitted that the companies winding up order dated 8 September 2020 ordering costs against NCK a non-party was not

A unlawful. It must therefore follow that the principles in *Badiaddin bin Mohd Mahidin* is not applicable to this case.

[25] With regard to the requirement that the appellant had to give warning to the respondent that the appellant would apply for cost against him personally, the appellant submitted that this requirement has been fulfilled via prayer 15.7 of the petition as well as via the two letters dated 10 August 2020 and 11 August 2020 respectively from Messrs Alex Chang & Co to the respondent.

[26] In relation to s 462 of the Companies Act 2016, the appellant submitted that s 462 governs voluntary winding up. The case before the learned JC is winding up by court and the applicable provision on costs is s 468(2) of the Companies Act 2016. Therefore, it is submitted that the learned JC had erred in law in applying s 462 in winding up by court.

[27] Section 468(2) of the Act provides:

> The liquidator shall, reimburse the petitioner out of the assets of the Company the taxed costs incurred by the petitioner in any such proceedings unless the court orders otherwise.

[28] It is submitted that if the Companies Act limited costs to be ordered out of the assets only, then the companies winding up court could never order any costs against the petitioners, liquidators or any other parties. It is submitted that the words 'unless the court orders otherwise' in s 468(2) allows the companies winding up court to apply the principles in the Rules of Court 2012 to order costs against non-party in an appropriate circumstances as has been done in the above cited cases.

G THE RESPONDENT'S SUBMISSION

[29] The learned counsel for the respondent submitted that the learned JC was right in setting aside the companies winding up order in relation to costs only as the order was seriously defective; contravenes ss 462 and 468(2) of the Companies Act 2016. These provisions only allow costs to be paid out of the assets of the company. Consequently, it is submitted that the companies winding up order dated 8 September 2020 is null and void on ground of illegality or lack of jurisdiction.

I OUR DECISION

[30] After a careful consideration of the facts and the law, we entirely agree with the appellant's submission. In this case, the respondent had not only affirmed an affidavits in opposition of the winding up petition on behalf of

LKD, but he had also filed a notice of motion to strike out the winding up petition. He is therefore, the directing mind of LKD since the two directors of LKD (as recorded in the Suruhanjaya Syarikat Malaysia) namely Abdul Jalal bin Kasnan and Muhamad Nasron bin Kasnan have lodged a police report stating they are not the directors of LKD.

[31] The respondent had chosen not to attend court despite the appellant's solicitors, Messrs Alex Chang & Co had duly informed the respondent of the hearing of the winding up petition on 8 September 2020 via two letters dated 10 August 2020 and 11 August 2020. In the said letters, we find the appellant had warned the respondent that they will apply for costs against him personally. In the circumstances, the respondent cannot complaint that the order of costs against him was made by the court upon hearing the appellant only. The respondent only had himself to blame.

[32] The Federal Court decision in *Takako Sakao*'s case had established that costs can be ordered against a non-party provided warning was given in advance to the non-party that costs will be applied personally against him as in the case here. By the principle of stare decisis, the High Court is bound by *Takako Sakao*'s case. There is no need for the learned JC to give a narrow interpretation to s 468(2) when the law is settled. When the court has power to order costs against a non-party, the original court order dated 8 September 2020 against the respondent to personally pay the costs is not a void or illegal order. It therefore follows that the principle in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Berhad* [1998]1 MLJ 393 is not applicable in the present case.

[33] For the aforesaid reasons, we find the learned JC had erred in law when he held the winding up court cannot order costs against the respondent, a non-party and in setting aside the order dated 8 September 2020 with respect to the costs. We therefore find there is merit in the appeal. Accordingly, we allow the appeal and set aside the decision of the High Court dated 16 June 2021. We award costs of RM10,000 here and below to the appellant subject to allocator.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar